IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1099 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANKUBHAI BHAYABHAI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
M/S THAKKAR ASSOC. for the appellants.
MR HM PRACHCHHAK, APP, for the respondent.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 03/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. This Criminal Appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Amreli, on 14th October, 1998, in Sessions Case No.8 of 1994, convicting the appellants for offences punishable under Sections 302 and 34 of the Indian Penal Code in respect of the murder of Vallabhbhai Lavabhai Patel, allegedly, committed on 28th September, 1993, at about 2.15 P.M. on Bagasara – Manekvada Road, at a place located at a distance of about 3 kms. from Bagasara. The Trial Court, after recording conviction, sentenced the appellants to undergo life imprisonment and to pay a fine of Rs.5000/- each, in default, to undergo rigorous imprisonment for one year.

2. The prosecution case, in brief, is that appellant No.1 had lodged a Criminal Case against deceased-Vallabhbhai Lavabhai Patel, in which the deceased came to be acquitted by the Trial Court a few days prior to the date of the incident. On the day of the incident, deceased-Vallabhbhai Lavabhai Patel was travelling on

the motorcycle of Jaskubhai Kathadbhai (P.W.3) and was going from Bagasara to Galath. They were followed by Parshottambhai Ghusabhai (P.W.1) and Vithalbhai Ranchhodbhai (P.W.2) on another motorcycle. When they were about to reach the place of incident, the appellants came from behind on a motorcycle, overtook the motorcycle of Parshottambhai Ghusabhai and Vithalbhai Ranchhodbhai and when they reached parallel to the motorcycle of Jaskubhai Kathadbhai, the pillion seat of which was occupied by deceased-Vallabhbhai Lavabhai, appellant No.2-Dilubhai Hadabhai, who was armed with a stick, inflicted a blow on the deceased. As a result, the deceased fell down. The appellants stopped their motorcycle. However, the deceased, who tried to run away from the place, was chased by the appellants and appellant No.2 inflicted stick blows on him. On receiving the stick blows, the deceased fell down. Then appellant No.1 started inflicting knife/dagger blows on the deceased. Appellant No.2 also inflicted further stick blows. As a result of the assault, the deceased started bleeding and died on-the-spot.

2.1 P.W.1-Parshottambhai Ghusabhai, therefore, went to

Bagasara and lodged an F. I. R. at the Bagasara Police Station, on the basis of which, an offence was registered and investigation started. The police recorded statements of witnesses, prepared Panhnamas, got postmortem performed, obtained certificate as to cause of death, sent the muddamal to Forensic Science Laboratory for chemical analysis and, ultimately, having found sufficient material against the accused persons, filed charge sheet against them in the Court of learned Judicial Magistrate, First Class, at Bagasara. The learned Judicial Magistrate, in turn, committed the case to the Court of Sessions, at Amreli, as the offences charged against the appellants were triable exclusively by the Court of Sessions. Sessions Case No.8 of 1994, therefore, came to be registered.

2.2 The Sessions Court framed charge at Exhibit 1, to which the accused persons pleaded not guilty and claimed to be tried. The prosecution has examined three eye-witnesses, one medical witness, one Executive Magistrate, who conducted the test identification parade and other police witnesses to prove the case against the accused. On appreciation of evidence led by the

prosecution, the Trial Court came to a conclusion that the prosecution was successful in establishing the charges against the accused and recorded conviction and awarded sentence, as stated in the earlier part of this judgment. Aggrieved by the said judgment and order, present appeal is preferred by the convicts.

3. Learned Advocate, Mr. Haresh N. Joshi, appearing for M/s Thakkar Associates, has taken us through the record and proceedings. Mr. Joshi submitted that, though the case is dependent on three eye-witnesses, their depositions do not inspire confidence. Mr. Joshi submitted that the prosecution case suffers from a number of defects and, therefore, the Trial Court was at error in recording conviction.

3.1 Mr. Joshi submitted that all the three eye-witnesses are chance witnesses. Their presence at the time and place of the incident is unnatural. P.W. 3 and the deceased were formerly closely associated. They were partners in a travel business. He submitted that P.W. 1 and P.W. 2 are caste fellows of the deceased and, therefore, their evidence, before being accepted, would call for

a close scrutiny. It was submitted by Mr. Joshi that identity of accused-appellant No.2 is not properly established by the prosecution. Holding of test identification parade was only an empty formality. The witnesses have not given any description of the second assailant other than accused No.1 while their statements were recorded. In the TI parade, the dummies arraigned besides the accused did not bear features similar to that of the accused. There was a chance that the accused, when brought to TI parade, could have been noticed by the witnesses because he was brought by police personnel without any mask over his face and identification of accused No.2 by the eye-witnesses, therefore, may be defective. The benefit must go to the accused as requisite procedure has not been strictly followed by the Executive Magistrate.

3.2 It was contended that the prosecution did not examine the Panch witnesses to the test identification parade Panchnama and, therefore also, the TI parade does not inspire any confidence.

3.3 Mr. Joshi contended that the relationship between the

witnesses and the accused was strained, if not enmical, and, therefore, the Court may not accept the version of the eye-witnesses in absence of a reliable test identification. Mr. Joshi, therefore, submitted that the appeal may be accepted.

4. Learned Additional Public Prosecutor, Mr. Prachchhak, has opposed this appeal. He submitted that presence of the eye-witnesses has been established through their evidence and it is also established to be natural. P.W. 1 and P.W. 2 had gone to Bagasara for shopping and while they were returning, they saw the deceased and P.W. 3 going ahead of them. P. W.3 was on that very motorcycle on which the deceased was a pillion rider and, therefore, it cannot be said that their presence at the time and place of the incident is not natural. Mr. Prachchhak submitted that the witnesses stay in a small village and it is common in that region that people go to town for shopping.

4.1 Mr. Prachchhak submitted that P. W. 3, in fact, is a caste fellow of the accused-appellants and he was a Panch witness in the earlier prosecution lodged by accused No.1 against the

deceased. It, therefore, cannot be said that he is an interested witness against the appellants.

4.2 So far as test identification parade is concerned, Mr. Prachchhak submitted that the Executive Magistrate, who conducted the TI parade is an independent person and will not be interested either in the case of the prosecution or in the case of the defence. His deposition shows that, he had taken all possible precautions and followed all the requisite formalities for conducting the TI parade. There is no reason to doubt the conduct of TI parade on account of non-examination of Panch witnesses. Mr. Prachchhak submitted that, in light of the recent pronouncements by the Apex Court, even if Panch witnesses turn hostile, the drawing of Panchnama can be proved through deposition of the Investigating Officer. The present case is placed on a far better footing as, here, the parade was held and the Panchnama was drawn in presence of the Executive Magistrate. Mr. Prachchhak submitted that the object of TI parade is to lend assurance to the Investigation Officer about the truthfulness of the eye-witnesses and their capacity and ability to identify the

assailants. Mr. Prachchhak submitted that, even if the TI parade procedure is found to be not so reliable and the corroboration that it was to lend to the evidence of eye-witnesses would stand withdrawn, then also, if the prosecution case is dependent on deposition of eye-witnesses, which is otherwise found to be reliable, the defect in TI parade would not affect the prosecution case fatally. Mr. Prachchhak has placed reliance on certain decisions in this regard, which would be examined by us in the paragraphs to follows.

5. The case against the appellants is founded on depositions of three eye-witnesses, namely, Parshottambhai Ghusabhai (Exhibit 59), Vithalbhai Ranchhodbhai (Exhibit 65) and Jaskubhai Kathadbhai (Exhibit 90). The medical evidence is in the form of deposition of Dr. Prahladbhai Manilal Patel (Exhibit 96) and Postmortem Notes (Exhibit 97). The F. I. R. at Exhibit 60, which is given by Parshottambhai Ghusabhai, does not disclose the exact identity of accused-appellant No.2 and, for that purpose, a TI parade was conducted in presence of the Executive Magistrate, Jayantilal Shivlal Gandhi, who has been examined at Exhibit 93.

6. The factum of death of deceased Vallabhbhai Lavabhai Patel, being unnatural, is not in dispute. In fact, the death being homicidal is also not seriously disputed on behalf of the appellants and, rightly so, in our considered opinion. The deposition of Dr. Patel (Exhibit 96) indicates that there were multiple injuries in the form of stab wounds, CLWs and incise wounds. There were in all 18 external injuries. There were six internal injuries corresponding to external injuries. External injuries No.1 to 5, 15 and 16 were, opined by the doctor, to be sufficient in ordinary course of nature to cause death. Injuries No.1 to 8 were possible with sharp edged and pointed weapon. Injuries No.9, 17 and 18 were possible with sharp edged weapon and injuries No.10 to 16 were possible with hard and blunt substance. According to the doctor, the injuries were possible with muddamal weapons knife/dagger and/or the stick. The doctor has opined that the cause of death was hypovolemic shock due haemorrhage resulting from injury to liver, right carotid and head injury, especially, external injuries No.15 and 16. It emerges that there were as many as 8 punctured woulds or stab wounds. There were 2 incise wounds and 7 CLWs. The tip

of right ring finger was chopped off. The stab wounds or punctured wounds were on vital parts of body like chest and neck. The CLWs. were also on vital part of the body like head. The brain substance was damaged, the liver was cut and the right carotid was cut. All these factors indicate that these injuries could not be either accidental or suicidal. The injuries have resulted into death of the deceased and, therefore, the injuries were homicidal and the deceased met with a homicidal death.

7. Now, if the evidence of eye-witnesses is seen, Parshottam Ghusabhai is at Exhibit 59. He is the first informant and, according to him, while he and P.W. 2-Vithalbhai Ranchhodbhai were going on their motorcycle from Bagasara to Galath, they noticed that the deceased and P.W. 3-Jaskubai were going on their motorcycle ahead of them. When they were about to reach the place of incident, the accused persons overtook them on their motorcycle. The motorcycle was being driven by accused No.1 and accused No.2 was on the pillion seat with a stick in his hand. The accused persons, after overtaking the witness, went further and when they came parallel to the motorcycle of P.W. 3

and the deceased, accused No.2 inflicted a stick blow on the deceased. This witness describes accused No.2 as the nephew of accused No.1 from village Rafaliya. The blow with stick was given by accused No.2 on head of the deceased. The witness identified accused No.2 in the Court as the assailant with stick. The witness says that he did not know name of the assailant at the time of the incident, but later on, he learnt his name. The witness identifies accused No.1 as the person who was riding the motorcycle. The witness then goes to say that, on accused No.2 inflicting stick blow, deceased-Vallabhbhai fell down. Then he got up and started running. At that time, accused No.2 started beating him with stick. At that time, accused No.1-Mankubhai drew out a dagger and started causing injuries to deceased-Vallabhai Lavabhai. Both of them attacked the deceased indiscriminately. The injuries were being caused in chest and neck. The witness says that Vallabhbhai was in company of Jaskubhai on the motorcycle. The witness says that they saw the incident. Jaskubhai also came back and stood with them and saw the incident. Thereafter, Jaskubhai left for Bagasara and accused No.1 told the witnesses also to go ahead. The witness says that they went towards Mujiyasar and then

stopped. After some time, they returned towards Bagasara and when they reached the place of incident, they saw that Vallabhbhai Lavabhai was dead and was bleeding from head, neck and chest. None of the accused was present. They, therefore, went to Bagasara Police Station and lodged the F. I. R. (the F. I. R. seems to have been lodged at 14.50 hours, i.e. a few minutes after the incident). The witness says that, after the incident, he had seen accused No.2 in the office of Mamlatdar during the TI parade and he had identified him before the Magistrate, at that time, when the accused was standing in a row with 7 – 8 young persons. The witness identifies knife/dagger as similar to the one which was with accused No.1 at the time of the incident. The witness has been cross-examined at length on all available aspects, but his deposition has remained unshaken. Learned advocate for the appellants could not point out anything from his deposition which would render his deposition doubtful.

7.1 Deposition of P.W.2-Vithalbhai Ranchhodbhai is at Exhibit 65. He says that he had gone with Parshottambhai Ghusabhai to Bagasara for shopping. On the way, the had a talk

interse that Jaskubhai and Vallabhbhai had gone to Amreli. The witness says that, at 2.00 P.M., they were free from their work at Bagasara and started for Galath on the motorcycle, which was ridden by him. When they came out of Bagasara, they noticed that Jaskubhai and Vallabhbhai were going in a motorcycle and Jaskubhai was riding the motorcycle and the deceased was sitting behind. The witness goes on to say that the accused persons came from behind. Accused No.1 was riding the motorcycle and his nephew from Rafaliya was the pillion rider, who had a stick in his hand. The witness identified the two assailants. He says that, he knew accused No.2 from a time prior to the incident as Rafaliya is nearer to the village of the witness. The witness says that, he had seen accused No.2 at the time of the incident, but did not know his name. The witness describes the actual occurrence in the same manner as it was described by Parshottambhai Ghusabhai, namely, that when the motorcycle of the accused persons reached parallel to the motorcycle of the deceased, accused No.2 inflicted a stick blow on head of Vallabhbhai and, as a result, he fell down and when the deceased started running away, accused No.1 stopped the motorcycle. Accused No.2 ran after Vallabhbhai and inflicted stick

blows on head of deceased-Vallabhbhai. Accused No.1-Mankubhai inflicted knife blows on various parts of the body like chest, hip, neck, etc. Jaskubhai, therefore, raised shouts to prevent further assault, but accused No.1 turned on him. Therefore, Jaskubhai left on motorcycle towards Bagasara. He noticed that accused No.2 was again giving stick blows on Vallabhbhai, during this time, indiscriminately. The witness says that they were asked to leave. The witness says that then they went towards Manekvada and stopped and, subsequently, came back after some time and noticed that Vallabhbhai was lying dead over there and the assailants had left. The deceased was bleeding from head, neck and chest injuries. The witness says that he and Parshottam went to police and lodged the F. I. R.

7.1.1 The witness says that accused No.1 had lodged a criminal case against deceased-Vallabhbhai in respect of an incident that took place about a year back and, in that case, deceased-Vallabhbhai came to be acquitted on 24th September, 1993, which is the cause for the incident. The witness says that he was called for TI parade by the Mamlatdar, Dhari. He and Parshottam went

together. Jaskubhai had also come. TI parade was arranged and they identified accused No.2. The witness says that he learnt about the name of accused No.2 later on. This witness is also cross-examined at length on various aspects to test his veracity, memory, etc., but nothing turns which would render the deposition incredible.

7.2 The third eye-wtiness is Jaskubhai Kathadbhai Basiya. He is examined at Exhibit 90. He says that he was partner with Vallabhbhai in Uday Travels.

7.2.1 On the incident, he says that the incident occurred on 28th September, 1993. Vallabhbhai Lavabhai came to him and asked him whether he would like to go to Amreli, which he refused. Then the deceased told him to drop him at the outskirts on the motorcycle and they went to the outskirts on the motorcycle. Ultimately, they went together to Amreli. The witness says that, after the work was over, when they were returning, they halted at Bagasara and started from there at about 2.00 P.M. He was riding the motorcycle and the deceased was on the pillion. He

says that when they reached near the place of incident, a motorcycle approached from behind, came parallel to their motorcycle and Vallabhbhai fell down and shouted. The motorcycle travelled further, but he slightly lost control. He says that Vallabhbhai fell down. He also says that one person was hitting Vallabhbhai with a stick. He then tried to take a turn on the motorcycle and saw that accused No.1 and his nephew were committing assaults on the deceased. Accused No.2 had stick in his hand and he inflicted stick blows whereas accused No.1 chased the deceased and inflicted blows with a big dagger. The witness says that, he raised shouts to prevent further assault. The assault was indiscriminate and he could not exactly note as to where the injuries were caused. He tried to contact police on phone, but there was no reply. He, therefore, went to Police Station on the motorcycle and found Parshottambhai and Vithalbhai over there and were dictating the F. I. R. The witness says that the person with accused No.1 was his nephew from village Rafaliya. He knew accused No.2 as they all belong to same caste and were otherwise also acquainted with each other. He identifies accused No.2 as the assailant. He says that, he had identified him in the TI parade as

well. This witness also is tested on the touchstone of cross-examination, but has been able to pass the test. In a lengthy cross-examination, he has given reply which do not help the defence in any manner. The witness has remained unshaken.

7.2.2 Learned Advocate for the appellant also could not point out any material from the deposition of this witness, which would render the deposition of the witness unbelievable or doubtful.

8. The only ground on which deposition of these three eye-witnesses is sought to be assailed is that their presence at the time and place of the incident is unnatural or improbable. Despite a close scrutiny, we are unable to identify any part of the deposition which would show likelihood of the witnesses not being present at the place of incident. On the contrary, what they have said in examination-in-chief explains their presence at the time and place of the incident and they have stuck to their version during cross-examination. It is not unknown that people from villages plan their household shopping and go to towns. Similarly, it is also not unknown that village people, while they go to town or city

for some work, they work out in advance for going in a company and that is how the presence of the three eye-witnesses gets established through their trustworthy depositions.

8.1 It is also contended that eye-witness, Jaskubhai, is on enmical terms with the accused persons. We do not find any material to infer this aspect. On the contrary, accused No.1 and Jaskubhai (P.W. 3) are caste fellows. It also transpires that P. W. 3 was a Panch witness in an earlier prosecution launched by accused No.1 against the deceased and, therefore, in absence of any other material animosity between the accused and P. W. 3 cannot be inferred.

8.2 It was also contended that P.W.1-Parshottambhai Ghusabhai and P.W. 2-Vithalbhai Ranchhodbhai are caste fellows of the deceased and, therefore, their version also would be tainted, they being interested in the deceased. In our opinion, deposition of a witness interested in the deceased will not be rendered vulnerable to doubt unless it is shown that the witness has some bias against the accused and some bias in favour of the deceased.

The appellants have not been able to show any material from the evidence that P. W. 1 and/or P. W. 2 had any grievance against the appellants.

8.3 From the foregoing discussion, it is clear that presence of eye-witnesses is properly established, their presence is natural and their depositions come in a natural way. The last but not the least, all the three eye-witnesses implicate accused No.1 by name and accused No.2 as nephew of accused No.1 from village Rafaliya and, later on, identify him as Dilubha, accused No.2. They all have identified him before the Court. They have also identified accused No.2 before the Executive Magistrate in the TI Parade. However, the TI parade is subjected to criticism, that the witnesses do not give detailed description of appearance of the assailant with stick prior to TI parade and, therefore, the identification of accused No.2 and the TI parade would be subjected to doubt. It is also contended that Panch witnesses to the TI parade have not been examined by the prosecution and, therefore, when the witnesses have not given description of the assailant and name of the assailant, and when the procedure followed at the TI parade was

not strictly in accordance with law, involvement of accused No.2 on the basis of evidence of the eye-witnesses by the Trial Court may not be upheld by this Court, as it would be vulnerable to doubt.

9. In order to appreciate the contentions raised by the appellant, it would be appropriate firstly to examine the law on TI parade. In this regard, reference may be had to the following decisions :-

(1) Chander Singh v. State of U. P., AIR 1973 SC 1200.

(2) Abbas Hasam Ghanchi v. State of Gujarat, 1993 (1) GLH 33.

(3) State of Gujarat v. Mahmad @ Munno Usmanbhai Chauhan, 1996 (2) GLR 821.

(4) State of Maharashtra v. Suresh, 2000 SCC (Cri.) 263.

(5) State of Rajasthan v. Darbara Singh, 2000 Cri. L.J. 2906.

(6) Simon and Ors. v. State of Karnataka, 2004 SCC (Cri.) 646.

(7) Abdul Waheed Khan alias Waheed & Ors. v. State of A. P., 2005 SCC (Cri.) 1301.

9.1 In **Abbas Hasam Ghanchi v. State of Gujarat, 1993 (1) GLH 33**, a Division Bench of this Court examined the question

of holding of test identification parade of accused and it was held that holding of test identification parade is not a matter of any idle formality and, therefore, it can never be a matter or leisure or pleasure or convenience of the Executive Magistrate. It is a matter of urgent duty to be attended to at the earliest and at any cost. Delayed holding of test identification parade is not only unfair to the eye-witness because of the memory problem but the same is equally unfair to the prosecution as good cases can be easily lost on the said count. It was held that it is equally unjust and unfair to the concerned unidentified accused too. The Division Bench took into consideration a circular issued on 5th August, 1955 from the office of the Chief Presidency Magistrate, describing the procedure required to be followed.

9.2 In **State of Gujarat v. Mahmad @ Munno Usmanbhai Chauhan, 1996 (2) GLR 821**, a Division Bench of this Court, while considering an acquittal appeal, found that the TI parade was not properly conducted as the dummies were not properly selected. The dummies were not of the same age group as that of the accused and the description of persons selected as dummies was

not mentioned in the Panchnama. There were other discrepancies found in the Panchnama and, therefore, the Division Bench upheld the decision of the Trial Court not accepting the evidence of TI parade and confirmed the acquittal on various other grounds besides this ground.

9.3 In **Chander Singh v. State of U. P., AIR 1973 SC 1200**, the Supreme Court held that the accused would not be entitled to benefit of doubt although identified by lesser number of witnesses in TI parade only on the ground that other persons had features which would distinguish the accused from them. In that case, one of the accused had brown eyes and person with such brown eyes was not mixed in the parade and in such a situation, the above view was taken.

9.4 In **Simon and Ors. v. State of Karnataka, 2005 SCC (Cri.) 646**, the Supreme Court took a view that generally sole testimony of witnesses in Court identifying the accused who is stranger to them is of a weak character and the Court insists on corroboration. But this is only a rule of prudence and whether

such testimony can form the basis of conviction without corroboration depends upon facts and circumstances of each case. Where accused is known to one of the witnesses, who identified him in Court and other witnesses corroborated his testimony, conviction can be based on such evidence. It was also held that mere wrong identification by one of the witnesses cannot be fatal to the prosecution case because it could be for variety of reasons.

9.5 In **State of Maharashtra v. Suresh, 2000 SCC (Cri.) 263**, the Supreme Court held that identification parades are not primarily meant for the Court. They are meant for the investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The Officer conducting the test identification parade should ensure that the said object of parade is achieved. If he permits dilution of the modality to be

followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held. In facts of that case, it was held that the safeguards adopted by the Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably foolproof manner.

9.6 In **Abdul Waheed Khan alias Waheed & Ors. v. State of A. P., 2005 SCC (Cri.) 1301**, it was held that the identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative to the statement in Court. The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of TI parade is to verify whether the witnesses who claim to have seen the culprits at the time of occurrence are able to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the

investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 and the Evidence Act. It is desirable that test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond their control and there is some delay, it cannot be said that to be fatal to the prosecution.

9.7 In State of **Rajasthan v. Darbara Singh, 2000 Cri. L. J. 2906**, a Division Bench of the Rajasthan High Court held that testimony of a witness cannot be discarded on the ground that he had not disclosed features of the accused at the time of identification parade.

10. What emerges from the above cited decisions is that, test identification parade should be held as promptly as possible after the arrest of the accused. However, if there is a delay in holding such TI parade for the reasons beyond control, the delay would not be fatal to the prosecution. The Officer holding the TI parade should take precaution to follow the requisite procedure as far as possible to achieve the object of the parade. If he permits dilution of the modality required to be followed in a parade, he must ensure that such relaxation does not impair the purpose for which the parade is held.

10.1 The identification parades are meant for investigation purposes and are not primarily meant for the Court. The object of conducting the test identification parade is to satisfy the witnesses that the person they suspect is really the miscreant whom they had seen and to satisfy the Investigating Authority that the suspect is the real person whom the witness had seen at the time of occurrence. Identification test do not constitute a substantive evidence and they are meant primarily for the purpose of helping

the investigating agency with an assurance that the investigation is progressing in the correct direction. Identification can only be used as corroborative of the statement in the Court. It is undertaken to check upon the veracity of eye-witnesses and to test the memory of such witnesses based upon the first impression.

10.2 On question of appreciation of evidence, the Apex Court has held in State of Maharashtra v. Suresh (supra) that, if potholes were to be ferreted out from the proceedings of the Magistrates holding such parades, possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every test identification parade would become unusable. It is, therefore, required to be seen whether any lapse or dilution in modality is such as to impair the purpose of the parade. Looking for test identification parade while appreciating the evidence of eye-witnesses is only a rule of prudence. Test identification parade itself is not a substantive piece of evidence. The substantive evidence would be the identification by witness before the Court.

11. If, with this background, the evidence on record of this case is examined, we find that the F. I. R. was lodged soon after the incident, the appellants came to be arrested after five days and the T. I. parade was held soon thereafter. The F. I. R. clearly discloses the identity of accused No.2 as nephew of accused No.1 from village Rafaliya. There is no dispute that appellant-accused No.2 is the nephew of accused No.1 and that he hails from Rafaliya.

11.1 From the evidence of the Investigating Officer, we find that he has taken all precautions to rule out the possibility of the accused being shown to the witnesses prior to holding of the parade. He has, in terms, stated that the witnesses were made to sit in a different room and they were brought one after the other in the room at the time of TI parade. It also emerges from his evidence that after the first witness identified the accused, he was not permitted to go out of that room till the TI parade was over and same thing was repeated in the case of the second witness. This was done, in our view, obviously with a view to ensure that there is no communication amongst the witnesses even after the identification by the first or the second witness. Bringing the

accused by police is requirement of law because the accused would be in custody of police at the relevant time. Bringing the accused under a cover or mask is a rule of precaution to prevent the accused being seen by the witnesses prior to TI parade. But when it has come on record that the witnesses were made to sit in a room when the accused was brought, the purpose is served, namely, ruling out the possibility of the witnesses seeing the accused being brought in by the police and, thereby, recognizing or identifying him.

11.2 This leads us to a conclude that there is no defect in holding of the TI parade. The next question that requires consideration is the effect of non-examination of Panch witnesses to the TI parade.

11.3 It is not in dispute that the Panch witnesses to the TI parade have not been examined by the prosecution. It is, therefore, contended that the TI parade Panchnama may not be accepted at face value. However, we are unable to accept this contention for the reason that the the eye-witnesses, who have identified accused

No.2 at the TI parade, have supported the prosecution case in clear terms. From their depositions as well as deposition of the Executive Magistrate, presence of Panch witnesses is established. From the depositions of these three eye-witnesses and the Executive Magistrate, we find that there is no challenge to the factum of the Panchnama being drawn in presence of Panch witnesses and, above all, comes an important aspect that the prosecution, while passing a Purshis regarding dropping of witnesses and closure of evidence at Exhibit 123, has clearly indicated that the independent witnesses, who remained to be examined, would not support the prosecution case and the learned Additional Public Prosecutor, in his wisdom, decided not to examine those witnesses. It is, ultimately, the discretion of the Prosecutor to decide which witnesses are to be examined and in which order and, therefore, we find that the prosecution has not examined these witnesses as they were not likely to support the prosecution case.

11.3.1 Now, on question as to what would be the effect of non-examination of these witnesses on prosecution case, it may be

observed that the prosecution has been able to prove the holding and conduct of TI parade through the evidence of the eye-witnesses, who identified accused No.2 at the time of TI parade and the deposition of the Executive Magistrate before whom the TI parade was held. The holding of TI parade, therefore, is appropriately proved by the prosecution and non-examination of Panch witnesses cannot be treated as adverse or fatal to the prosecution. For arriving at this conclusion, we derive support from the decision of the Apex Court in the case of **Madan Mohan v. State of Rajasthan, (1978) 4 SCC 435** and another decision in **Mohd. Aslam v. State of Maharashtra, (2001) 9 SCC 362**, where a view is taken that, even if Panch witnesses turn hostile, evidence of person who effected the recovery would not stand vitiated. Adopting the same analogy in the instant case, non-examination of Panch witnesses to the TI parade will virtually have the same effect as they not supporting the prosecution case. In fact, it emerges from Exhibit 123 that the learned Prosecutor conducting the trial was of the opinion that they were not likely to support the prosecution case and, in such a situation, they were not examined. The TI parade Panchnama and the factum of holding of TI parade

is proved through the evidence of the Executive Magistrate. We have no reason to disbelieve his deposition. He is a Government Officer independent of the Investigating Agency. He will have no interest either in the prosecution or in the defence and, therefore, his evidence would stand even on a better footing than that of the Investigating Officer and, therefore, in our opinion, non-examination of Panch witnesses will not have any adverse effect on the prosecution case, if the deposition of the officer conducting the TI parade or holding the TI parade inspires confidence, as is the case in the case on hand.

12. Now that the evidence of eye-witnesses is found to be trustworthy, they clearly implicate accused No.1 from the beginning and consistently, there is evidence as to identification of accused-appellant No.2 before the Executive Magistrate; the witnesses have also identified accused-appellant No.2 before the Court; and involvement of both the appellants is found in commission of the offence, the only conclusion would be that the offence of murder of deceased-Vallabhbhai Lavabhai was caused by the appellants by inflicting knife/dagger and stick blows.

13. The incident occurred on 28th September, 1993. It has come on record that appellant No.1-Mankubhai had initiated a criminal proceeding against the deceased and the deceased came to be acquitted in that case on 24th September, 1993, as is emerging from deposition of Vithalbhai Ranchhodbhai (Exhibit 65). This is a strong piece of evidence to show that accused No.1 had a strong motive for commission of the offence and accused No.2 is the nephew of appellant No.1. The manner in which the incident has occurred is also significant. The two accused persons chased the deceased on motorcycle and committed assault on him sparing Jaskubhai, who was also on the motorcycle. This makes it clear that the deceased, against whom accused No.1 had grievance, was the only target. The injuries caused by the appellants speak volumes about the intention of the appellants and leave no room for taking any other view.

14. It was contended that the evidence of identification before the Court is of a weak character. There cannot be any dispute on this legal proposition. But, in the instant case, we find

that the eye-witnesses had identified accused No.2 before the Executive Magistrate at the time of TI parade. Assuming for a moment that the evidence on TI parade does not inspire confidence, then also that would not vitiate the evidence of eye-witnesses, as evidence in the form of TI parade is only a corroborative piece of evidence. The Court may, while appreciating the evidence of eye-witnesses, look for other corroboration if the evidence of eye-witnesses does not fully inspire confidence, which is not the case here. Still, however, we may observe that the version of eye-witnesses gets support from other surrounding circumstances, which can be narrated as under :-

(1) The F. I. R. is given immediately after the incident where appellant No.2 is described as nephew of appellant No.1 from village Rafaliya.

(2) Clothes of appellant No.2 recovered during investigation are found to contain blood stains of the group of the deceased.

(3) The stick which is identified by eye-witnesses as the one used

by appellant No.2 is found to contain blood stains of the group of the deceased.

These contemporaneous material lends support to the version of the eye-witnesses.

15. In light of the foregoing discussion, we are of the view that the Trial Court cannot be said to have erred in holding that the prosecution was successful in establishing charges against the appellants and in recording conviction. We do not find any reason to interfere with the judgment and order impugned in the appeal. The appeal, therefore, must fail and stands dismissed. Judgment and order of conviction and sentence of the Trial Court is hereby confirmed.

[A. L. DAVE, J.]

[BANKIM M. MEHTA, J.]

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